IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 93-02597**
TEDDY LEROY KIGGINS,	)	
	)	**MEMORANDUM OF DECISION**
Debtor.	)	
_____	)	

Kenneth E. Lyon, Jr., Pocatello, Idaho, for Debtor.

Stephen J. Blaser, Blackfoot, Idaho, for Vickie Smith.

I. Background

Debtor Teddy Leroy Kiggins ("Debtor") filed a petition for relief under Chapter 7 of the Bankruptcy Code on September 2, 1993. Debtor received a discharge on January 5, 1994. The case was closed on August 18, 1994. On November 17, 1999, Debtor filed a motion to reopen the bankruptcy case, which motion was granted by order entered the same day.

On December 13, 1999, Debtor filed a "Petition to Remove Lien in Violation of Automatic Stay" directed to the claim of creditor Vickie Ann Kiggins, now known as Vickie Malm ("Creditor). The Court will treat this "petition" as a motion.[1] Creditor filed an objection to the motion on January 25, 2000. A

[1] While Debtor styled this pleading as a "petition," the Court assumes such

hearing on Debtor's motion was held on January 27, 2000, after which the matter was taken under advisement. After a review of the record and submissions of the parties, this decision constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

II. Facts

From the file, the following appear to be relevant facts. Debtor and Creditor were formerly married. On December 4, 1986, Debtor obtained a default decree of divorce in state court. In the divorce decree, Creditor was awarded ownership of the parties' residence and Debtor was required to pay one-half of the parties' second mortgage on the home, or $11,692.50, within three years of the date of divorce. On September 27, 1989, the mortgage was foreclosed and Creditor lost the home. Because Debtor had not paid his half of the second mortgage, Creditor sued Debtor in state court and obtained a default judgment against him in the amount of $26,659.55 on November 25, 1992.[2] Creditor recorded the judgment in Twin Falls County on January 21, 1993, and

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to be less than artful use of bankruptcy terminology. A petition is the pleading which commences a bankruptcy case, *see* 11 U.S.C. § 301; Fed. R. Bankr. P. 1002(a). Relief of the type requested by Debtor must be obtained by filing a motion under Fed. R. Bankr. P. 9013 - 9014; 4003(d).

[2] The record is unclear as to how the state court calculated the amount due from Debtor to Creditor for inclusion in the default judgment.

in Bannock County on February 29, 1994, and June 2, 1995. On June 22, 1998, Creditor renewed her judgment, which now totals $41,672.05.

In the meantime, however, on September 2, 1993, Debtor had filed for bankruptcy and on January 5, 1994, received his discharge. Debtor scheduled his debt to Creditor on Schedule F as an unsecured nonpriority claim in the amount of $28,435.64, in spite of the existence of the recorded judgments.

In his pleadings, Debtor seeks to have Creditor's judgment liens "removed" as to his residential real property located in Twin Falls County as having been obtained and recorded in violation the automatic stay provisions of Section 362 of the Bankruptcy Code. However, at hearing, Debtor's counsel asked to amend his requested relief, arguing that Section 522(f)(1) allows for avoidance of Creditor's judgment liens. Without objection from Creditor, the Court allowed Debtor to proceed under this new theory.[3] Creditor objects to Debtor's motion, however, arguing that the judgment debt was on account of alimony or support arising from the parties' divorce decree, and is therefore not avoidable as provided by Section 522(f)(1)(A)(i).

III. Avoidance of Judicial Lien

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[3] As a result, the Court expresses no opinion concerning the validity of Creditor's judgment or lien under Section 362.

Both Debtor and Creditor rely upon the current provisions of the Bankruptcy Code as controlling the outcome of this matter. However, Debtor filed for bankruptcy prior to the passage by Congress of the 1994 Bankruptcy Reform Act, which legislation made several important changes to Section 522(f). The distinctions in the two versions of the statute are important.

The post-1994 version of the law allows for avoidance of a judicial lien if it "impairs" a debtor's exemption in the homestead. The concept of "impairment" is explained in Section 522(f)(2)(A), which constructs a simple mathematical formula comparing the value of the exempt property with the amount of unavoidable liens on the property, together with the amount of the applicable exemption, to determine if a lien should be avoided. Importantly, the amended statute also provides that the right to avoid a judicial lien does not apply to any such lien that secures a debt to a former spouse for alimony, maintenance or support awarded in connection with a divorce. 11 U.S.C. § 522(f)(1)(A)(i).

In 1993, when Debtor's bankruptcy petition was filed, Section 522(f) read in pertinent part as follows:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been

> entitled under subsection (b) of this section, if such lien is–
>
> (1) a judicial lien, . . .

11 U.S.C. § 522(f). "Impairment" was not defined by the statute. However, the case law interpreting this provision as it existed prior to the 1994 amendments made it clear that if *any* equity existed in the debtor's residential real property above the value of the consensual liens combined with the homestead exemption, then the debtor's exemption was not impaired by the judicial lien, even if the lien exceeded the amount of debtor's equity in the home. *City National Bank v. Chabot (In re Chabot)*, 992 F.2d 891, 894 (9th Cir. 1993).[4] In addition, the statute contained no exception to avoidance for liens on account of alimony or support.

The threshold issue is, therefore, which version of the law applies? The answer is found in *Wynns v. Wilson (In re Wilson)*, 90 F.3d 347 (9th Cir. 1996). In response to a debtor's argument based upon the revisions effected by the 1994 amendments, the Ninth Circuit held that "[t]he amendments to section 522(f) do not apply here, since generally the Bankruptcy Reform Act of 1994

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[4] *Chabot* was subsequently superceded by the 1994 amendments which added the mathematical formula in Section 522(f)(2)(A). However, *Wilson* specifically held that *Chabot* controlled in cases filed before October 22, 1994, the effective date of the Bankruptcy Reform Act of 1994. *Wilson*, 90 F.3d at 350.

applies only in bankruptcy cases filed on or after October 22, 1994." *Wynns*, 90 F.3d at 350. As a result, here Debtor must prove the judgment lien impairs his homestead under a *Chabot* analysis, and Creditor's judgment lien is not excepted from avoidance solely because it may represent a debt for alimony or maintenance.

Under Section 522(f)(1), the Court must determine the value of Debtor's homestead and the amount of Debtor's equity over valid liens subject to exemption. The case law is basically in accord that, for purposes of Section 522(f), the extent of a debtor's equity, and in that regard, the value of a debtor's exempt property, is to be determined as of the date of the filing of the bankruptcy petition. *Owen v. Owen*, 500 U.S. 305, n. 6 (1991); *Rowe v. Jackman (In re Rowe)*, 236 B.R. 11, 14 (9th Cir. B.A.P. 1999); *In re Finn*, 151 B.R. 25, 27 (Bankr. N.D. N.Y. 1992); *Windfelder v. Rosen (In re Windfelder)*, 82 B.R. 367, 371 (Bankr. E.D. Pa. 1988).

Neither Debtor nor Creditor submitted evidence or testimony concerning the value of Debtor's homestead or the amount owed on unavoidable liens on the date the bankruptcy was filed. Referring solely to Debtor's bankruptcy schedules, he values his residence at $80,000. In addition, Debtor listed a deed of trust held by First Security Bank on his residence on which he

owed $49,893.88, and also a deed of trust held by the Veterans Administration in the amount of $44,264.07. Under Idaho Code § 55-1003, Debtor was entitled to, and claimed, a $50,000 homestead exemption. Based upon this limited record, it would appear that Creditor's judgment lien would impair Debtor's homestead exemption.

However, since the parties were not afforded an opportunity, nor were they prepared, to produce evidence on this issue, the hearing on Debtor's motion must be continued so that the parties may submit such evidence and testimony, if they so choose.

IV. Dischargeability

There was also considerable discussion by the parties with the Court concerning whether, even if avoided, Creditor's judgment would be nondischargeable. In her objection to Debtor's motion, Creditor asks that the mortgage debt be determined excepted from discharge under Sections 523(a)(5) and (15) of the Bankruptcy Code. The Court declines to do so in this context.

Because it is not necessary to the lien avoidance issue to determine whether Creditor's judgment against Debtor would be excepted from discharge under Section 523(a)(5), Fed. R. Bankr. P. 7001(6) clearly requires an adversary proceeding to determine the dischargeability of that debt. While the

parties have invited the Court to do so, no decision concerning the discharge issue is made here.

V. Conclusion

For the reasons stated above, the Clerk will be directed to schedule Debtor's motion for a continued hearing at which time the Court will receive any evidence offered by the parties concerning the avoidability of Creditor's judgment liens under Section 522(f)(1), if the parties have not resolved the issues.[5]

DATED This 22nd day of February, 2000.

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JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

[5] The parties should carefully weigh settling this matter. Creditor should remember that Section 523(a)(15), added by the 1994 amendments to the Code, did not exist at the time Debtor's bankruptcy petition was filed, and is likely inapplicable in this case. Debtor should consider that even if Creditor's prior judgment lien is avoidable, if Creditor's judgment is excepted from discharge under Section 523(a)(5), it remains enforceable and could likely be recorded anew, giving rise to a new lien.

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
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CASE NO.: 93-02597

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED: February 22, 2000

By_____
Deputy Clerk